VII complainants should also be contacted. A second Bilingual letter should focus, in appropriate cases, on the time sequence between the departure of a minority and the hiring of her replacement.

Beaumont, 854 F.2d at 507, teaches that when there is evidence of possible discrimination and the licensee has all of the facts, the Commission must do more than write letters to the licensee to get at the truth: it must find witnesses, including possible discrimination victims. In other words, it must start acting like a law enforcement body.

Yet far from following Beaumont, the Commission deliberately refuses to consider allegations of discrimination against named victims in Title VII complaints. This anomaly in Commission regulatory history, which would be amusing if it weren't so troubling, should be put to rest immediately.

The Commission has created a unique Catch-22 which makes it virtually impossible to bring a discrimination case. When granting an application in the face of overwhelming statistical evidence of discrimination, the Commission typically relies on the absence of any individual complaint of discrimination.[15]

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[15] The absence of such complaints should surprise no one. In a small industry, the act of filing an EEO complaint is commonly viewed by management as a sign that an applicant or employee is not a team player or is a troublemaker. That is especially true if the complaint is not resolved in the applicant's or employee's favor. Such a person frequently has to leave the industry entirely, or leave town and work in another broadcast market, because management will "blackball" the person from further media employment.

The fact that retaliation is unlawful is largely irrelevant: it is seldom caught unless a brave witness with inside information comes forward. The Civil Rights Organizations -- again and again --

See, eg., South Carolina Renewals, supra, 5 FCC Rcd at 1708 ¶38.

On the other hand, the Commission will not investigate a discrimination allegation until it becomes a final order. New York Times Broadcasting Service, 63 FCC2d 695, 700 (1977) (taking note of a 6th Circuit finding that the licensee discriminated against a female employee, but refusing to act until proceedings on remand were concluded); see also NBC, 62 FCC2d 582 (1977) (Commissioners Hooks and Fogarty dissenting). At times, this forbearance from regulation is taken to extremes. See, eg., WAVY Television, Inc., 53 RR2d 655, 658 (1983) (ignoring discrimination complaints by eleven Black employees, and issuing a full term renewal without conditions.)

The "final order" rule, as applied to discrimination cases, all but immunizes every discriminator from Commission review. It should come as no surprise that the Commission has never reviewed a final order in a discrimination case. It is usually far cheaper for a discriminator to wear down through delay, or pay off a discrimination victim to avoid Commission scrutiny and strong risk of loss of license if the plaintiff's case has merit. Such cases typically require at least seven years to litigate

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receive calls from aggrieved persons urging review of a particular station but pleading "don't use my name or I'll lose my job." Yet the Commission has done nothing to protect retaliation victims. See Field Communications Corp., 68 FCC2d 817, 819 n. 4 (1978) (Commission would not consider a citizen group's affidavit that a Black employee was a victim of discrimination but feared retaliation if she came forward. The Commission felt it was enough that the EEOC's Rules protect her against retaliation.) It would behoove the agency to adopt rules to protect complainants which parallel the EEOC's anti-retaliation rules.

through the federal courts -- a time period which well exceeds the three or four years the most valuable stations usually remain in the same hands before being sold.

One such case, involving WSM-AM-FM in Nashville, began in 1973. See WSM, Inc., 66 FCC2d 994, 1006-1008 ¶¶29-32 (1977); see particularly n. 19 (dating complaints to 1973). The Title VII and §1981 litigation concluded in 1989 with final court orders of discrimination against three Black victims. Unfortunately, the stations had by then changed hands three times. Is it any surprise that the Commission did nothing, knowing it could not unscramble three successive assignments of the licenses to reach the original discriminator?

The Commission will not even look at a case which has become final if finality occurred through a private settlement between a licensee and a Title VII complainant. This can only create the misimpression that a licensee or franchisee faced with a Title VII complaint can purchase a license renewal or certification by paying off the private complainant. In comparative hearings and other areas of regulation, the Commission never allows private parties, through settlement, to substitute their judgment of the public interest for the Commission's judgment. See WWOR-TV, Inc., 6 FCC Rcd 1524 (1991) and California Broadcasting Corp., 6 FCC Rcd 283 (1991) (rejecting settlements). Even in EEO cases not involving charges of individual acts of discrimination, the Commission has long held to that view. See Lin Texas Broadcasting Corp., 55 FCC2d 604 (1975) (the absence, or

withdrawal, of a complaint "does not relieve the Commission of its statutory duty to determine that a grant of the [renewal] application would serve the public interest.")

Indeed, the only cases in which the Commission held licensees accountable for individual acts of discrimination came about only because the licensees were exempt from Title VII's 15-employee jurisdictional threshold. See Catoctin, supra (five employees); Leflore Broadcasting Co., 65 FCC2d 556 (1977), aff'd, Leflore Broadcasting Co. v. FCC, 636 F.2d 454 (D.C. Cir. 1980) (seven employees); Federal Broadcasting System, Inc., 59 FCC2d 356 (1976) (11 employees). Under the FCC/EEOC Agreement, supra, 70 FCC2d at 2331 §III(a), the Commission is required to investigate such cases, since the EEOC cannot do so. This anomaly in the law sends the message that licensees and cable systems may discriminate at will as long as they have more than fifteen employees.

This Catch-22 should end immediately. The Commission should announce that when a discrimination complainant or plaintiff, including one settling her private litigation,[16] has made out a prima facie case of discrimination, the Commission will hold a hearing on whether the licensee or franchisee has the requisite character to continue to hold any Commission

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[16] Settling parties might be expected to scuttle the Commission's independent public interest examination of the once-active complaint by having a judge vacate any adverse findings. However, that should not prevent the Commission from making use of the underlying evidence to develop its own findings. See Shawn Phalen, 7 FCC Rcd 7638, 7639-7640 ¶13 (1992).

authorizations.

5. The Cable SIS monitoring procedure should be extended to broadcasting.

The Cable SIS monitoring system, although not without its flaws, embodies a sound concept: due diligence by the agency into the basis for representations made under penalty of perjury. Misrepresentation is often a good indication of discriminatory intent. Beaumont, supra. Furthermore, a licensee which knows it will be forced to prove its bonafides will be much more careful to comply vigorously in the first instance. In addition, the act of responding to an SIS-type inquiry can have a focusing, cathartic impact on a licensee, motivating it to systematically review its own performance bonafides through frequent self assessment.

6. The Commission should perform both targeted and random field audits, using a procedure similar to that employed by the IRS for tax audits.

Particularly egregious cases, developed first on paper, should be followed up with field audits of the type used already (albeit uncommonly) in cable EEO regulation. These audits should be conducted with far more regularity for cable systems. This procedure will reduce the chance that a challenged licensee or franchisee will distort the record with paper filings it knows nobody will look behind.

Random review of at least a handful of stations would have a tremendous deterrent effect. A station whose EEO house is in order need not fear a site visit, anymore than it would fear an FOB inspector visiting its tower. However, noncomplying stations

who have managed to conceal their noncompliance through carefully crafted Form 396s will be warned to be honest and comply, knowing they may be the subject of a random site visit.

7. Site audits should include a review of all personnel files.

A site audit should be conducted in the same way the Commission would conduct any other investigation: it should include a review of all potentially relevant files. A common thread of Title VII litigation is the maintenance by management of two sets of files on employees -- the personnel file available to that employee, and a secret file in which management "builds a case" against a person it wants to eventually feel free to terminate. Indeed, the majority of Title VII cases yield evidence of a two-files system maintained by defendants. Broadcasters are no different.

8. In appropriate cases, predesignation discovery should be had.

When a licensee stonewalls, petitioners to deny should be allowed limited predesignation discovery, at least on an experimental basis. Discovery in EEO cases involves no reinvention of the wheel: in every EEO case brought under Title VII or 42 U.S.C. §1981, defendants must submit to full discovery so that the plaintiff can be in a meaningful position to respond to a denial of discriminatory intent, or a defense of business justification. See, eg., Ward's Cove Packing Co. v. Atonio, 109 S.Ct 2114, 2124 (1989). Bilingual II did not hold that the Commission cannot authorize predesignation discovery; it merely

reaffirmed that the Commission has discretion to assign to itself, rather than to private attorneys general, the task of investigating EEO complaints. See also Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656 (D.C. Cir. 1974) ("Bilingual I") (encouraging the Commission to allow petitioners to deny to conduct predesignation discovery).

9. The Midterm License Review, as Presently Implemented is an Ineffective Enforcement Strategy. The Review Should Entail and Examination of a Broadcaster's overall EEO Efforts. An Early Warning Letter Should Have a Bearing on the Magnitude and Nature of Any Sanction Imposed at the End of the License Term.

The 1992 Cable Act directed the FCC to institute a mid-term license review of the employment practices of television broadcasters.[17] The Commission has interpreted this directive as a requirement to perform a statistical analysis of the number of females and minorities in the workforce of each licensee and to issue a deficiency letter, if the number does not comport with the Commission's processing guidelines.[18]

The so-called "mid-term review" adopted by the Commission flies in the face of EEO enforcement and contradicts policy disfavoring government inefficiency and administrative waste.

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[17] The Commission shall revise the regulations described in subsection (a) [47 C.F.R. 73.2080] to require a midterm review of television broadcast station licensee's employment practices and to require the Commission to inform such licensees of necessary improvements in recruitment practices identified as a consequence of such review.
47 U.S.C. Section 334(b).

[18] NOI para. 7.

The "mid-term review" utilizes a substantial amount of administrative resources to conduct an analysis that licensees are in a position to perform themselves - and certainly should be required to perform in order to effectively self-analyze their EEO efforts.[19]

Secondly, the Commission's policy of issuing mid-term "deficiency letters" to stations that do not comply with FCC processing guidelines does not measure up to the requirements of the Cable Act. The Act specifically calls for the Commission to use the review as a basis for "inform[ing] ...licensees of necessary improvements in recruitment practices...". 1992 Cable Act Section 334 (b). In order to carry out this mandate, the Commission must do more than assess the number of minorities and women employed at a station.

For reasons, not clearly explained, the Commission has departed from its traditional procedure of examining a licensees overall EEO efforts. NOI para. 5. The plain language of the 1992 Cable Act calls for a mid-term review of licensee "employment practices". 1992 Cable Act Section 334 (b). Employment practices consists of recruitment efforts, promotional procedures, numbers of hires and promotions, as well as efforts undertaken to implement the licensee's EEO program. 47 C.F.R. 73.2080 (b).

Commenters urge the Commission to investigate the full-range of licensee employment practices in order to carry out the intent of Congress - namely, to provide intelligent and useful advice

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[19] 47 C.F.R. 73.2080 (c)(5).

about what steps should be undertaken to improve recruitment practices.

Commenters also contend that the goals of the Cable Act would be promoted if the results of the mid-term review were taken into consideration when determining the nature and amount of any sanction imposed at the time of license renewal. For example, if the Commission finds at the time of license renewal that a licensee failed to comply with mid-term review advice, a presumption of intentional non-compliance should apply. Historically, intent or absence of intent on the part of a licensee has been a factor when determining the appropriate sanction. A high financial forfeiture or denial of the renewal application would be in order should a licensee be found to be in intentional violation of the Commission's rules.

Not only should the midterm review process for television be given teeth, the procedure should be used for radio as well.

The majority of broadcast EEO noncompliance is found in the radio industry. Because radio license terms are longer than those for TV or CARS licenses, midterm review of radio stations is even more important than for TV or cable.

Exclusion of radio from serious EEO scrutiny cannot be rationally justified. As the Second Circuit has held, the Commission may not exempt two-thirds of its licensees from EEO scrutiny simply because they have fewer than 15 employees. Office of Communication of the United Church of Christ v. FCC, 566 F.2d 529, 533 (2d Cir. 1977) ("UCC III").

The Commission can commence radio midterm EEO reviews through the issuance of a staff guidance letter, without going through rulemaking. For jurisdictional purposes, it is sufficient that the Commission would not be going off on an tangent in applying television midterm review to radio as well. See NBMC v. FCC, supra, 822 F.2d 277 (upholding Commission's decision to apply new FM engineering rules to all FMs even though the scope of licensees included in the notice of proposed rulemaking was only a relatively small class of FMs.)

Midterm review is especially critical to compensate for the 1982 extension of TV and radio license terms to five and seven years respectively. Currently, when a Bilingual investigation commences, the licensee need only supply three years of EEO records. The earlier two (TV) or four (radio) years of minorities' ruined careers are washed out completely. Even blatant discrimination during those years would go uncovered and unpunished. Those years are akin to a 700 mile long superhighway with a sign posted saying "no state troopers for the next 400 miles."

Midterm review should encompass a licensee's hiring profiles as well as the implementation of its EEO program. Longstanding Commission practice emphasizes EEO procedures, and de-emphasizes a showing of what might be only token hiring, as the best guarantee of equal opportunity. Broadcast EEO, supra, 2 FCC Rcd at 3967, 3973-3974 ¶¶44-50. The 1992 Cable Act, §22(f), requires

the Commission to conduct a midterm review of "employment practices." No rational reading of the words "employment practices" supports the conclusion that Congress meant "statistics" and not the actual acts and omissions attendant to implementation of an EEO program.

E. The Decision to Hold a Hearing or Impose Sanctions, Including Forfeitures

The Civil Rights Organizations strongly believe that only when an important authorization is potentially at risk -- such as a license -- do regulated entities have a strong incentive to comply with an important rule whose premise they may viscerally oppose. Nonetheless, while not believing that forfeitures accomplish very much, the Civil Rights Organizations do wish to note that the level of forfeitures is so low as to be virtually meaningless.

A $12,500 standard EEO sanctions is minor, and it is seldom issued with dispatch. Political broadcasting, obscenity and engineering infractions are adjudicated promptly after the violations occur. However, it takes five to ten years from the time the misconduct occurred before the Treasury ever collects the money from an EEO forfeitures

A $20,000 forfeiture, issued where there has been a seven year period of continuous violations, is almost meaningless, amounting to $7.82 per day. Such a sum is a small fraction of the value of most broadcast stations. As a penalty for possible discrimination, or even for deliberate withholding of employment opportunities from minorities, such a sum is meaningless. It is

far less than the social cost of such withheld opportunities. If only one minority person was victimized in each of a radio license term's seven years, those persons' foregone wages would be far more than $20,000. Add to that the value to society of these persons as potential influences on broadcast programming (see NAACP v. FPC, 425 U.S.at 670 n. 7) and it is crystal clear that the types of fines being issued are far too low. When a Commission licensee or franchisee has deprived minorities and women -- the majority of its labor pool -- of opportunities and access to gainful employment for seven years, a $7.82 per day fine is a cruel joke.

The Commission has not hesitated to issue forfeitures totalling hundreds of thousands of dollars in indecency cases. A $20,000 maximum EEO sanction, compared with a $600,000 "dirty words" fine, sends the message that a licensee's actions to retard the careers of perhaps dozens of minorities are valued by the Commission at 1/30 as troubling as dirty words.

The range of sanctions available to the Commission is narrower than it should be, and some of those sanctions are essentially meaningless. In the Civil Rights Organizations' experience, an admonishment, as a litigation outcome, is universally viewed by the offending broadcaster as a complete vindication.

Conditional renewals are little more than a one-shot set of paperwork. The cost is written off on the licensee's taxes and the work is delegated to minor subordinates.

When licensees had to conduct ascertainment and file meaningful renewal applications, a short term renewal meant something. See, eg., Triple X Broadcasting Co, 51 FCC2d 585 (1975) (radio station had no Black employees for three years). Since program deregulation, a short term renewal means little more than preparing a new Form 396 and filing it with a postcard. Notwithstanding that sea change in the meaning of a renewal, the Commission never reevaluated the significance -- or insignificance -- of a short term renewal. See Bechtel, supra (agency must reevaluate past policies in light of changed circumstances).

Another sanction formerly used but since set aside for political and ideological reasons is goals and timetables. They were first used in Sonderling Broadcasting Corp., 68 FCC2d 752 (1977) and last used in Arkansas TV Co., 46 RR2d 883 (1979). They never should have been eliminated as a regulatory tool, and they should be reinstituted now.

Yet another tool which has not been used in 20 years is job structure analyses. They are commonly used in EEO jurisprudence -- except at the FCC -- whenever there is evidence that members of a protected group are being shunted into one type of position to the exclusion of others. This commonly happens to women, who seldom have an opportunity to rise beyond the glass ceiling level of secretary or administrative assistant. It also commonly happens to minorities, who are historically excluded from sales or management positions at many stations. At some AM/FM stations

in which one of the stations is minority formatted, minorities may be denied opportunities to work at the nonminority formatted station -- an EEO violation which is easily masked by virtue of the licensee's ability to combine AM and FM employment on Form 395. The last time the Commission required a job structure analysis to resolve discriminatory job assignment allegations was in Independence, supra, 53 FCC2d at 1166, a case in which an AM/FM combination whose AM side was Black-formatted was found to have offered no opportunities to Blacks to work on the rock-formatted FM side.

Yet another enforcement tool the Commission might find attractive is an EEO demerit in a comparative hearing. Before the initiation of all-or-nothing character determinations in comparative proceedings, the Commission awarded a demerit in Town and Country Radio, 41 RR2d 1177, 1180 (Rev. Bd. 1977), based on deficient EEO records at several broadcast stations controlled by the comparative hearing applicant's major stockholder. That approach is still appropriate where EEO violations are found to be serious but not intentional, so that they do not implicate the applicant's character. Such a policy could be applied to any comparative case in which a licensee or franchisee principal, or a senior manager responsible for EEO compliance, is a party to a comparative applicant.

In deciding whether to hold a hearing or issue sanctions, the Commission should reform its review of the record, as discussed below.

1. The Commission should state that it will not reject, out of hand, any type of evidence of possible EEO noncompliance -- including inferential evidence, statistical evidence, and evidence of noncompliance at co-owned stations.

In considering whether any renewal application or certification should be granted, the Commission should reject no significant evidence. It should not use the discretion given to it in Florida NAACP v. FCC, D.C. Cir. No. 93-1162 (released May 27, 1994) ("Florida NAACP") to disregard evidence presented by a petitioner to deny (e.g., statistical computations) while crediting bald assertions of a licensee (in Florida NAACP, for example, claims that low pay and long commute from Black neighborhoods inhibit minority employment, where there was no record evidence of low pay, a long commute or any inhibiting of minority employment from these alleged inhibiting factors).

One piece of evidence the Commission should consider is whether other stations or cable systems under common ownership also violate the EEO rules. A few group broadcasters have, regrettably, exhibited a pattern of EEO violations at several of their facilities. Since EEO certifications or renewals of licenses of those facilities usually do not occur simultaneously, the EEO record of any one facility usually is not considered in conjunction with a ruling on the EEO record of another. Yet the mere coincidence that a group owner's or MSO's certifications or renewals do not occur simultaneously is no excuse for failure to scrutinize the group's or MSO's conduct as a group or MSO. See Florida Renewals, 2 FCC Rcd 1930, 1935 n. 17 (1988), affirmed but

criticized in pertinent part sub nom. Tallahassee NAACP v. FCC, 870 F.2d 704, 710 (D.C. Cir. 1988) ("Tallahassee").

Unfortunately, the Commission has completely failed to investigate complaints of systematic EEO noncompliance by group owners. See, eg., Federal Broadcasting System, Inc., 59 FCC2d 356, 371 (1976) (designating an EEO issue against a station where there was an individual complainant, but refusing to do so against a sister station 65 miles away because of the absence of an individual complainant. Both stations used explicitly sex-segregated job application forms asking men their announcing credentials and women their typing credentials).

At times, the Commission's reluctance to examine group owner and MSO noncompliance has been supported by irrational explanations amounting to little more than "we've always done it this way." Group ownership and MSOs have growing importance, owing to deregulation of the national broadcast ownership limits and of the local duopoly rule,[20] and to growing horizontal concentration in the cable business. The Commission should respond with heightened scrutiny of group owners and MSOs.

The Commission's failure to come to grips with group owners' and MSOs' systematic EEO practices represents a significant gap in Commission EEO enforcement. It is also inefficient and

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[20] The Commission should revise broadcast Forms 395 and 396 to accommodate, and require, combined reports from local combinations of three or four co-owned stations. Since this would involve no change in policy, it can be accomplished by a ministerial order issued without notice and comment.

expensive, since atomized review of group owners and MSOs' EEO performance requires duplication of effort in evaluating often identical practices by a group's or MSO's facilities.

Another piece of evidence the Commission should recognize and consider is the fruits of basic statistical tests used to analyze EEO noncompliance in cases before every other EEO enforcement agency in the United States. See Florida NAACP, supra. Statistical evidence should be more important at the FCC than at the EEOC, since the FCC has a responsibility to protect the public interest while the EEOC's primary responsibility is to protect private discrimination victims. Patterns of noncompliance, such as those revealed by statistics, should go right to the heart of the Commission's affirmative duty under §309 of the Act to find that a licenseehas the requisite character to remain one. See Alabama Educational Television Commission, 50 FCC2d 491, 493 (1974) (in which the Commission acknowledged that even without direct evidence of intentional discrimination, "[a] policy of discrimination may be inferred from conduct and practices which display a pattern of underrepresentation of minorities from a broadcast licensee's overall programming" (emphasis supplied)).

Statistical proof is especially helpful when it provides an objective basis to decide when a single minority hire is mere tokenism and when it should be taken to be material evidence of compliance. Too often, the hiring of one minority -- even a

secretary,[21] even a parttime person [22] -- immunizes a licensee's entire five or seven year record of EEO noncompliance. The Commission should encourage, but not require, the use of statistical tools in litigating EEO cases.

Yet another type of evidence the Commission should consider is a nonresponsive answer to Form 396, to a petition to deny, or to a Bilingual letter. This should be read as an indication that no compliance efforts occurred through the conscious choice of the licensee or franchisee. Any prudent, EEO-complying applicant would have answered Form 396, a petition or a Bilingual letter responsively.

The inference of noncompliance from nonresponsiveness is fundamental in any regulatory scheme. See McCormick on Evidence §2272 (1984) ("if a party has it peculiarly in its

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[21]/ Little credit can be awarded for employing a secretary. Secretaries have dignity, and the low-pay status of a secretary is not the reason a station should receive no EEO mitigation credit for employing one. The reason no such credit is deserved is that a secretary does not influence program content. See NAACP v. FPC, supra, 425 U.S. at 670 n. 7 (FCC's EEO rule is justified because of potential influence of minority and female employees on programming of broadcast stations). See Nondiscrimination in Broadcasting, supra, 13 FCC2d at 771, citing with approval the statement by the Department of Justice that "[b]ecause of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries."

[22]/ Parttime minority employment is routinely considered in mitigation. Century Broadcasting Corp., 40 RR2d 1019 (1977) (short term renewal).

power to produce witnesses whose testimony would elucidate the transaction, the fact that it does not do it creates the presumption that the testimony, if produced, would be unfavorable"), quoted in Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev. Bd.), recon denied, 3 FCC Rcd 5631 (Rev. Bd. 1988), affirmed, 5 FCC Rcd 5561 (1990); see also C. Wright and K. Graham, Federal Practice and Procedure §5124 at 587 (1977) (it is reasonable to infer that "evidence not produced would be adverse to the party with peculiar access to the evidence"), quoted in Voce Intersectario Verdad America, Inc., 100 FCC2d 1607, 1613 (Rev. Bd. 1985). The Commission need not await the rare applicant whose Form 396 narrative explicitly states that it does not obey the EEO rules. See Rust Communications Group, Inc., 53 FCC2d 355 (1975). Where, as often happens, an applicant offers nothing on Section VIII of Form 396, or ignores an allegation in a petition to deny or Bilingual letter, deliberate noncompliance must be inferred.

2. Forfeitures should be assessed at mid-term as well as at the close of a renewal term.

Midterm review should be more than a warning without regulatory consequences. An agency should never deprive itself of the power to act on the fruits of its own investigations. The Commission should give teeth to midterm EEO reviews, and in doing so should explicitly overrule Equal Employment Violations, 56 RR2d 445, 447 (1984) (refusing to consider midterm petitions to deny not making out a prima facie case of discrimination).

If the Commission finds wrongdoing in its midterm EEO

reviews, it already has power to act then and there. See Leflore Broadcasting Company, 36 FCC2d 101 (1972) (in which the Commission designated cases for early renewals.) The Commission should make it known that it will not hesitate to call in a renewal early if serious misconduct is found.

III. FINDINGS AND RECOMMENDATIONS -CABLE TV

Similar to broadcast EEO policy the Commission's enforcement strategy with respect to cable TV has focused on overall efforts. NOI ¶ 9. The ineffectiveness of this policy is reflected in the poor improvement in the number of minority and women employed in the cable TV industry.

The Commission's Cable TV rules took effect in 1985. Since that time there has a *de minimis* increase in the number of minorities and women the industry's workforce (Section IB, supra).

In order to enhance enforcement, Commenters stress the need for an increase in the Commission's processing guidelines and a revision of the Commission's interpretation of the Cable Act's financial forfeiture provisions. These and other recommendations are provided below.

A. THE COMMISSION SHOULD INCREASE THE CABLE PROCESSING GUIDELINES FOR THE "ZONE OF REASONABLENESS" TO 100% PARITY.[23]

The statistical levels of minorities and women is no less telling in the cable industry than it is in broadcast. In fact,

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[23] Broadcast processing guidelines were extended to cable in 1983. FCC Public Notice # 1364, released December 15, 1983.

Congress recently underscored the need for an increased level of parity in the 1992 Cable Act. Finding that minorities and women continue to be underrepresented in employment in the cable as well as broadcast industry, and that this underrepresentation threatens the "diversity of the expression of views in the electronic media," Congress called for the "rigorous enforcement of equal opportunity rules and regulations." 1992 Cable Act Section. Commenters urge the Commission to revise its processing guidelines for cable as well, adopting 100% parity as the standard, out of a belief that "rigorous enforcement" entails nothing less. See (broadcast argument) infra.

B. DESPITE A POOR INDUSTRY-WIDE TRACK RECORD ONLY TWO CABLE OPERATORS HAVE RECEIVED A FINANCIAL FORFEITURE. THE CABLE ACT PERMITS FORFEITURES TO BE ASSESSED FOR REPEATED EEO VIOLATIONS WITHIN A SINGLE YEAR.

It has been the practice of the Commission to impose a financial penalty only in the event that an operator has failed to obtain EEO certification 3 or more times over a 7 year period. This has resulted in only two operators ever receiving a forfeiture penalty[24] and has contributed to the dismal EEO track record of the cable industry.

It is permissible to impose a forfeiture penalty if the Commission finds

> through an investigation [that an operator] failed to meet or failed to make best efforts to meet the [EEO] requirements of [the Act] or [Commission] rules under this section.

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[24] Adelphia Communications Corporation, 9 Fcc Rcd 908 (1994); Prime Cable, 4 FCC Rcd 1696 (1989).

Section 634(f)(2) of the Communications Act of 1934.

Elsewhere, the Act says that a cable operator that "willfully or repeatedly" fails "to comply with the requirements of this section" has substantially failed to comply with the Act.[25] Taken together, the two subparagraphs clearly indicate that not a single violation but multiple violations are required in order to trigger a financial forfeiture.

The Commission has mistakenly seized upon the following language to mean that an operator must fail to obtain certification 3 or more times over a 7 year period in order to be sanctioned.

> For the purposes of this paragraph, the term "repeatedly," when used with respect to failure to comply, refers to 3 or more failures during a 7 year period.

Section 634(f)(1) of the Communications Act of 1934.

This interpretation is clearly inconsistent with the plain language of the Act. "Failure to comply" does not mean failure to obtain certification.[26] Rather, it means failure to comply with the "requirements" of the Act or Commission regulations promulgated under the Act. The requirements referred to in Section 634 (f)(2) are clearly set forth at the beginning of the Section 634 and are comparable to the 5-point plan that applies to broadcasters. Cable operators are obligated to

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[25] Section 634(f)(1) of the Communications Act of 1934

[26] The failure to obtain certification...shall not itself constitute the basis for a determination of substantial failure to comply with this title.
Section 634 (f)(1) of the Communications Act of 1934.

Define the EEO obligations of management,

Inform its employees of EEO policies,

Utilize qualified recruitment sources,

Conduct a continuing program to remove discrimination, and

Conduct periodic self-assessment.[27]

Repeated violations of these requirements or regulations adopted in support of these requirements constitute a basis for a financial forfeiture.

An examination of the legislative history gives further support to this interpretation. Congress contemplated that multiple violations of the above requirements might occur within a single year - thus, triggering a financial penalty.

> For the purpose of determining whether an entity has committed repeated violations, the Committee notes that it may be possible to commit more than one violation in a single year."

House Committee of Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong. 2d Sess., (1984) at 91.

The Commission should revise its policies to conform to the clear intent of Congress. If as a result of an investigation the Commission finds that an operator repeatedly violates any of the EEO requirements set forth either in the Act or Commission regulations a financial forfeiture should be imposed. Commenters maintain that such an interpretation is consistent with the Cable Act and will serve to improve EEO compliance by cable operators.

C. THE ANNUAL EMPLOYMENT REPORT, FORM 395-A, SHOULD BE REVISED TO MORE ACCURATELY EVALUATE AN OPERATOR'S EEO EFFORTS

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[27] Section 634 (c) (1)-(5) of the Cable Act of 1992.

In response the Commission's 1993 Notice of Proposed Rulemaking,[28] OC/UCC interviewed FCC EEO Branch staff concerning the efficacy of the Annual Employment Report, Form 395-A.[29] Staff indicated that 50 percent of all cable operators subjected to on-site audits are found to be in noncompliance.[30] Yet, some of the very same operators that have failed audits have also submitted Annual Employments Reports indicating full compliance. These findings raise significant questions about the reliability of Form 395-A - the instrument chiefly relied upon by the Commission to identify noncompliance.

Form 395-A contains nine questions intended to ascertain information about a cable operator's EEO efforts.[31] Each question requires a mere "yes" or "no" response. No supporting documentation is required to be submitted.

In an effort to evaluate whether the Form 395-A is effective in identifying noncompliance, OC/UCC examined 85 Employment Reports filed with the Commission in 1991. Seven hundred and fifty six, or 99 percent, of the questions examined contained a

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[28] Notice of Proposed Rulemaking, MM Docket 92-261, 8 FCC Rcd 266 (1993). ("Cable TV NPRM").

[29] Interview with staff of FCC EEO Branch on February 14, 1993.

[30] See also NOI para. 17.

[31] Examples of the questions in Form 395-A are: whether they contact minority organizations as part of their recruitment effort, whether promotions are carried out in a non-discriminatory manner, and whether they analyze the results of their EEO efforts.

"yes" response.[32] It is difficult to reconcile this result with the general 50 percent failure rate of audited cable operators.

Common sense dictates that operators will be inclined not to answer questions accurately. Regulated business are generally unwilling to provide written evidence the would implicate their activities. As a second survey reveals, cable operators cannot be relied upon to self-report noncompliance.

In a second survey, OC/UCC examined the Annual Employment Reports of the cable operators that were denied EEO certification in 1991.[33] One hundred percent of the questions examined contained a "yes" response by cable operators that were subsequently found to be ineligible for EEO certification.

Both the above surveys indicate that the Annual Employment Report - the primary instrument relied upon by the Commission to ascertain an operator's EEO "efforts" - does not accurately represent employment practices.

Commenters recommend that the Commission amend Form 395-A by:

1) revising the second question to require a quantitative response. Specifically - "Since filing your last Form 395-

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[32] Question # 2 was responded to in the negative only nine times. Positive responses were qualified with exhibits and explanations three times.

[33]. The nine operators that were denied certification in 1991 were: Eastern Telecom Corporation of Allegheny Cty. PA., Blue Ridged CATV Inc. of Carbon Cty. PA., Northland Cable Television Inc., of Madera Cty. CA., Heritage Cablevision of S.E. Massachusetts of Providence, R.I., Mission Cable Company of Austin, Texas, R&R Technologies Inc., of Gwinnet Cty. GA., and Mission Cable Company of Travis Cty. TX. The last two units are either regional or corporate headquarters.